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# Compulsory Care-giving: Some Thoughts on Relational Feminism, the Ethics of Care and Omissions Liability

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## INTRODUCTION

In the course of their university education every law student can expect to grapple with the rules governing criminal liability for omissions.<sup>1</sup> The assertion that, presumptively, a criminal offence must be committed by an act, and the associated reluctance to prohibit failures to act in all but exceptional circumstances, is a jurisprudential principle crafted and clarified by a line of eminent, and male, jurists in the United Kingdom (from Lord Macaulay<sup>2</sup> and Sir James Stephens<sup>3</sup> in the nineteenth century to Glanville Williams<sup>4</sup> and Lord Diplock<sup>5</sup> in the late twentieth) in vivid and often colourful prose.<sup>6</sup> On the other hand, there has been a noticeable dearth of literature considering the gendered implications of this conventional account of omissions liability.<sup>7</sup> It might seem quite understandable to some that this particular aspect of criminal theory has previously failed to attract feminist critique; the concept has little apparent significance in the criminal law's well-documented contribution to women's historic and contemporary disadvantage. However, I want to suggest, alternatively, that it can be seen to go to the heart of recent theorising about gender, particularly the work of relational or 'difference' feminists, if one considers its role in law's discursive construction, and material regulation, of care-giving.<sup>8</sup> In this article I shall draw briefly upon the insights of relational feminist jurisprudence in order to provide a preliminary re-reading of the theory and practice of omissions liability. While accepting postmodern feminist concerns with the apparently essential feminine voice often claimed to underpin relational theory, I would still assert the value of interrogating the approach to criminal omissions (partly inspired, some might argue, by masculine anxieties) from the perspective of the ethics of care.

The article has three parts. The first part reconsiders feminist legal theory and its critique of law and, in doing so, sets out a series of concerns with the criminal process: its role in the continued material violence against women;

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<sup>1</sup> Although, of course, the issue of omissions liability also arises in tort law and theory: see B. Markensinis and S. Deakin, *Tort Law* (Oxford: OUP, 1999), pp.137-142.

<sup>2</sup> T. Macaulay, *Notes on the Indian Penal Code* in Lady Trevelyan (ed) *Miscellaneous Works of Lord Macaulay* (New York: Harper, 1880).

<sup>3</sup> J. Stephens, *Digest of the Criminal Law* (London: Macmillan, 1877).

<sup>4</sup> G. Williams, 'Criminal Omissions – the Conventional View' (1991) *Law Quarterly Review* 86.

<sup>5</sup> *Miller* [1983] 2 AC 161.

<sup>6</sup> See below, nn. 25 and 31.

<sup>7</sup> An exception is Herring's recent article on the particular gendered impact of section 5 of the Domestic Violence, Victims and Crime Act 2004 which, he notes, tends to criminalise women whose failure to take steps to protect their children from harm by a partner is often the result of domestic violence: see J. Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?' [2007] *Crim LR* 923.

<sup>8</sup> C. Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982).

the oppressive potential of its discursive construction of women; and the gendered structure of legal reasoning and adjudication. In the second part, I reconsider the classic debates over the duty of (easy) rescue. I ask whether the historic refusal of the common law to countenance such a duty, at least within the Anglo-American legal tradition, reflects to some extent the prioritisation of an ethics of justice over an ethics of care in legal reasoning, arguably derived from overwhelming masculine anxieties about the prospect of annihilation at the hands of the other.<sup>9</sup> Nevertheless, the article goes on to advise that relational feminists exercise caution before seeking to enforce care-giving towards strangers by criminal sanction, before highlighting possible feminist concerns with the rules of omissions liability already in place.

### **FEMINIST LEGAL THEORY AND THE ETHICS OF CARE**

Feminist legal theory consists of an array of complex, heterogeneous analytical positions, reflecting the variety of perspectives found within the broader feminist movement.<sup>10</sup> Nevertheless, to my mind Joanne Conaghan's recent summary of its key characteristics provides a useful starting-point:

First, feminist legal scholars seek to highlight and explore the gendered content of law and to probe characterizations positing themselves as neutral and, more specifically, ungendered. Secondly, they are part of a cross-disciplinary feminist effort to challenge traditional understandings of the social, legal, cultural, and epistemological order by placing women, their individual and shared experiences, at the centre of their scholarship. Thirdly, feminist legal scholars seek to track and expose law's implication in women's disadvantage with a view to bringing about transformative social and political change.<sup>11</sup>

What, though, is meant by the gendered content of law and, more specifically, the criminal law? Particular criminal laws tend to attract the interest of feminists because of their direct material impact upon women (for example, the law of rape), or their negative discursive constructions of women (for instance, the partial defences to murder and battered women who kill). Importantly, however, feminist scholarship also recognises that "there is something not merely about particular laws or sets of laws, but rather, and more generally, about the very structure or method of modern law, which is hierarchically gendered".<sup>12</sup> The rules on omissions liability, as I shall try to show, have gendered implications, potentially, on each of these grounds.

In doing so, I want to reconsider in this article the legal rules governing omissions liability in the United Kingdom in light of one particular stream of feminist legal theorising, relational or 'difference' feminism, developed most recently in the 1980s primarily by psychologist Carol Gilligan and, in the legal

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<sup>9</sup> Of course, the countries of continental Europe have been much more willing to impose criminal law duties to rescue: see, for instance, A. Ashworth and E. Steiner, 'Criminal Omissions and Public Duties: the French Experience' (1990) 10 *Legal Studies* 153.

<sup>10</sup> J. Conaghan, 'Reassessing the Feminist Theoretical Project in Law (2000) 27(3) *Journal of Law and Society* 351, pp. 357-358.

<sup>11</sup> Ibid, p.359. See, also, the feminist legal methodology set out in K. T. Bartlett, 'Feminist Legal Method' (1970) 103 *Harvard Law Review* 829.

<sup>12</sup> N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998), p. 2.

sphere, the scholarship of Robin West.<sup>13</sup> Difference feminism grew up in contradistinction to earlier feminisms that denied the existence of meaningful differences grounded in sex and gender as part of the struggle for formal equality for women. Instead, difference feminists argued that important social distinctions do exist between men and women, deriving particularly from women's experience of maternity and child rearing, and that these differences must be recognised if women's disadvantage is to be effectively addressed. In turn, cultural feminists asserted further the positive contribution of women's idiosyncratic approach to moral reasoning while highlighting what they saw as the patriarchal ethics of a society administered by men for their own benefit.

Cultural feminists worked thereafter to promulgate a specifically feminine ethics of care emphasising (in law and elsewhere) the value of relational modes of moral reasoning, which better reflected the interdependency of women's material and existential lives. For Gilligan and later theorists, while

men *tend* to embrace an ethic of rights using quasi-legal terminology and impartial principles ... women *tend* to affirm an ethic of care that centers on responsiveness in an interconnected network of needs, care, and prevention of harm. Taking care of others is the core notion.<sup>14</sup>

This idea of a feminine ethics of care not only celebrated previously ignored or devalued characteristics traditionally attributed to women, but also promised

a vision of human relationships and of society grounded upon the primacy of human connectedness, wherein care and compassion are seen as fundamental and where emotions, peaceful co-operation, empathy, friendship and responsibility are aspired to rather than universal, abstract, rational principles (autonomy, freedom, justice, equality and rights).<sup>15</sup>

Accordingly, many feminist scholars excitedly began to develop and invoke an ethics of care in pursuit of a utopian feminine vision for societal organisation.<sup>16</sup>

I want to pick up on two applications of the ethics of care to legal studies in particular. First of all, feminist legal scholars quickly positioned the ethics of care in opposition to the contemporary liberal legal order and the significance it places upon individuality and detachment. For instance, Robin West has argued powerfully that the "official story" of liberal legalism is defined by men's experience of material and existential separation, their desire to protect that autonomy and, more importantly, their unshakeable fear of impending annihilation by the other.<sup>17</sup> For West, this "separation thesis" explains why law

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<sup>13</sup> C. Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982); R. West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (1987) 81(3) *Wisconsin Women's Law Journal* 81; R. West, 'Jurisprudence and Gender' (1988) 55(1) *University of Chicago Law Review* 1; R. West, *Caring For Justice* (New York: NYU Press, 1997).

<sup>14</sup> T. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (New York: OUP USA, 2001), p. 371.

<sup>15</sup> M. Drakapolou, 'The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship' 8 (2000) *Feminist Legal Studies* 199, pp. 204-5.

<sup>16</sup> See for example, V. Held, *The Ethics of Care: Personal, Political and Global* (Oxford: OUP, 2005) and M. A. Slote, *The Ethics of Care and Empathy* (London: Routledge, 2007).

<sup>17</sup> R. West, 'Jurisprudence and Gender' (1988) 55(1) *University of Chicago Law Review* 1.

remains so desperately protective of individual autonomy. It is also important, secondly, to recognise the challenge posed by the ethics of care to the central role of impartiality within this asserted patriarchal jurisprudence. Relational feminists have observed that both Kantian and utilitarian ethics demand, in the pursuit of fairness, that we treat human beings as indistinguishable from one another. They then point out that in doing so these ethics obfuscate the reality that human beings invariably hold specific prior ties with particular people; relationships that hold individual meaning for us and our identities.<sup>18</sup>

For some feminists, however, particularly those who subscribe to a postmodern and poststructuralist understanding of women's oppression, the ethics of care has proven extremely problematic. In its claims about the existence of essential femininity it threatens to mask both the difference between women on grounds of race, class and sexuality and the possibility that psychology is socially constructed rather than biologically foundational.<sup>19</sup> Perhaps most importantly, as feminist legal scholar Drucilla Cornell observes,

essentialist or naturalist theories of the feminine have been ethically and politically condemned for providing a new justification for the old stereotypes, even if those stereotypes are now supposedly being used to *affirm* the feminine.<sup>20</sup>

As someone sympathetic to poststructuralist concerns,<sup>21</sup> I am conscious of the dangers inherent in the naturalist claims about the voice of the essential women. Indeed, I consider later in this article how the association of women with an ethics of care by feminist can reinforce gendered stereotypes that themselves contribute themselves to women's oppression. Nevertheless, I remain open here to the political potential of an ethics of care, de-coupled from essentialist, biological explanations of women's nature, as a competing vision for moral reasoning in legal theory. In addition, whatever one concludes about women's natural nurturing capabilities, one must at least be prepared to recognise that they remain disproportionately responsible for care-giving.

Feminist legal scholars have drawn upon the ethics of care in various contexts to challenge what they view as the "inappropriately atomistic vision of the social world" evoked by the contemporary liberal legal order.<sup>22</sup> Nicola Lacey has concluded, however, that "[i]nterestingly, this is a less salient feature of criminal law than of, say, contract law; criminal law is, after all, in the business

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<sup>18</sup> Ibid, pp. 13-14.

<sup>19</sup> L. Alcoff, 'Cultural Feminism versus Post-Structuralism: the Identity Crisis in Feminist Theory' (1988) 13(3) *Signs* 405; V. Taylor and L. Rupp, 'Women's Culture and Lesbian Feminist Activism: A Reconsideration of Cultural Feminism' (1993) 19(1) *Signs* 32. For a poststructuralist challenge to the legal theory of Robin West, see K. Sheehan, 'Caring for Deconstruction' (2000) 12 *Yale Journal of Law and Feminism* 85.

<sup>20</sup> D. Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (London: Routledge, 1991), p. 33.

<sup>21</sup> N. Cobb, "Gay Couple's Break Like Fawlt Towers": Dangerous Representations of Lesbian and Gay Oppression in an Era of "Progressive" Law Reform' (2009) 18(3) *Social and Legal Studies* (forthcoming).

<sup>22</sup> N. Lacey, 'General Principles of Criminal Law? A Feminist View' in D. Nicolson and L. Bibbings, *Feminist Perspectives on Criminal Law* (London: Routledge, 2000), p. 94. For a recent thoughtful reappraisal of the relevance of Gilligan's work for feminist legal scholarship, see E. Rackley, 'From Arachne to Charlotte: An Imaginative Revisiting of Gilligan's *In A Different Voice*' (2007) 13(3) *William & Mary Journal of Women and the Law* 751.

of articulating reciprocal responsibilities”.<sup>23</sup> Perhaps this is true (although Lacey seems to ignore the important point that the criminal law does more than merely articulate responsibilities; it imposes them).<sup>24</sup> Nevertheless, for me omissions liability is a conceptual element of the general principles of criminal law that is, in fact, ripe for reconsideration through the lens of the feminist ethics of care. To my mind the jurisprudence in this area is concerned, at its core, with the extent of the care-giving responsibilities we owe to other people and the extent to which law, as a disciplinary system, can and should be utilised to enforce such responsibilities. To support this claim, I want to reconsider, in the first part of the following analysis, the perennial jurisprudential debate over the hypothetical criminal law duty of (easy) rescue.

### **MASCULINE ANXIETIES: AUTONOMY, ANNIHILATION AND THE 'DROWNING STRANGER'**

Jurisprudential debates over the legitimacy of omissions liability have tended to crystallise around the duty of (easy) rescue. The Anglo-American legal tradition, unlike its European continental counterpart, has refused historically to recognise an enforceable responsibility of this kind. Lord Diplock has made the most recent and memorable judicial statement to this effect in his opinion in *Miller* drawing (as so many other commentators have) upon the Christian parable of the Good Samaritan to reinforce his point.<sup>25</sup> However, the classic exposition of what Andrew Ashworth describes as ‘the conventional view’<sup>26</sup> of criminal omissions is of course found in Stephen’s *Digest of Criminal Law*:

A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.<sup>27</sup>

Reluctance to criminalise even easy and deliberately harmful failures to rescue stems from the explicit assertion that offences of this kind are an unjustifiable incursion into individual autonomy.<sup>28</sup> In the words of Wilson,

punishing omissions ... seems to compromise rather than enhance human freedom and autonomy since it makes demands of us which may require us to subjugate our own interests to those of others. ... [Such a duty] is apt to stigmatise the very people which liberal society cherishes – those who go around minding their own business and whose destiny is to leave no kind of mark on society let alone a bloody one.<sup>29</sup>

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<sup>23</sup> Ibid, p. 94.

<sup>24</sup> Compare, for example, in the contract field, L. Mulcahy, ‘The Limitations of Love and Altruism – Feminist Perspectives on Contract Law’ in L. Mulcahy and S. Wheeler, *Feminist Perspectives on Contract Law* (London: Glasshouse, 2005), pp. 1-19.

<sup>25</sup> In the words of Lord Diplock, “The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the state of treating it as criminal”: *Miller* [1983] 2 AC 161, p. 175.

<sup>26</sup> A. Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 84 *Law Quarterly Review* 424, pp. 427-430.

<sup>27</sup> J. Stephens, *Digest of the Criminal Law* (London: Macmillan, 1877), p.135.

<sup>28</sup> Note, though, that arguments derived from claims of autonomy are not the only criticisms levelled at omissions liability. For instance, William Wilson identifies contemporary objections grounded in autonomy, legality and fair labelling: see W. Wilson, *Central Issues in Criminal Theory* (Oxford: Hart, 2002), pp. 91-102.

<sup>29</sup> W. Wilson, *Central Issues in Criminal Theory* (Oxford: Hart, 2002), pp. 91 and 94.

Critics conclude that while causing harm by one's actions is justifiably the subject of criminal prohibition, failing to prevent harm is not.<sup>30</sup>

An important observation by those liberals opposed to duties to rescue is that, unlike other forms of liability, they would work to restrict an individual's autonomy unpredictably: arising without warning should an individual actually stumble across the hypothetical drowning stranger. What I find particularly interesting about the historic jurisprudence in this area, however, is that these fears about freedom seem to extend psychically far deeper. In his *Notes on the Indian Penal Code*, first published in 1864, Lord Macaulay provides one of the classic expositions of the conventional view. Explaining the decision by the framers of the Code to preclude liability for failing to rescue a stranger in danger, he concludes:

We are sensible that in some of the cases which we have put, our rule may appear too lenient; but we do not think that it can be made more severe without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man, a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line.<sup>31</sup>

Concern with line-drawing between acceptable and unacceptable failures to rescue continues to this day. Implicit is a fear of incursion into individual autonomy far beyond the time and energy expended upon a particular rescue. Macaulay reveals a broader anxiety that law's claim to rationality and impartiality brings with it an apocalyptic vision of economic and class revolution stemming inevitably from that first simple demand that we care.

This powerful construction of the autonomous, unconnected individual permanently threatened by annihilation seems to accord well with the masculine imperatives underpinning the legal order identified by relational feminists, particularly Robin West. It might be tempting to conclude, then, that the refusal to impose a duty of easy rescue reflects the lack of value placed upon an ethics of care within the liberal legal order. Our patriarchal legal system, one might argue, just doesn't care about the drowning stranger; if it did, it would be willing to impose a duty of (easy) rescue. However, to do so

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<sup>30</sup> For a classic exposition of this view see G. Williams, 'Criminalising Omissions – The Conventional View' (1989) 86 *Law Quarterly Review* 88. See, also, A. Leavens, 'A Causation Approach to Criminal Omissions' (1988) 76 *California Law Review* 547.

<sup>31</sup> T. Macaulay, *Notes on the Indian Penal Code* in Lady Trevelyan (ed) *Miscellaneous Works of Lord Macaulay* (New York, Harper: 1880), pp. 254-255. In another, perhaps more famous passage, Macaulay contends: "It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die. It is difficult to say whether a penal code which should put no omissions on the same footing with acts, or a penal code which should put all omissions on the same footing as acts, would produce consequences more absurd and revolting ... *Indeed, it is hard to conceive how, if either were adopted, society could be held together.*": T. Macaulay, *Notes on the Indian Penal Code* in Lady Trevelyan (ed) *Miscellaneous Works of Lord Macaulay* (New York, Harper: 1880), p. 252 (my emphasis).

would, in my view, reflect a failure to consider the subtleties of this jurisprudence. The value of care-giving is, in fact, consistently emphasised.

As Alan Norrie notes, “it is not commonly argued that the easy rescue case is defensible in terms of what is socially proper or expected”.<sup>32</sup> Indeed, judicial pronouncements on the subject have been described as “deliberately provocative”.<sup>33</sup> A’s specifically intentional effort to allow B to die in Stephen’s example, and the ease with which he could carry out the rescue, certainly suggests a desire to emphasise the moral rectitude of the former’s behaviour. On occasion the stranger is specifically identified as a child in an apparent effort to emphasise the distinction between obviously unethical behaviour and the appropriate ambit of the criminal law, while jurists tend to go out of their way to condemn the conduct. In short, the paradigm “drives a wedge between the commonsense expectation or evaluation of what constitutes an omission and the law’s conception of the same”.<sup>34</sup> Underpinning preclusion of liability in this context is the belief that an ethical project of this kind is inappropriately imposed using the machinery of the criminal law, rather than an assertion that we owe no such ethical duty toward our fellow human beings in practice.

Additionally (as every law student also knows) the ‘conventional view’ of omissions liability is only one such vision to be found within the contemporary liberal legal order. Andrew Ashworth is just one liberal commentator in recent years to propose a competing ‘social responsibility view’ that, among other things, advocates the imposition of a duty of easy rescue.<sup>35</sup> This perspective derives from the assertion that individual autonomy cannot be achieved without reliance upon other human beings: “[t]he foundation of the argument is that a level of social co-operation and social responsibility is both good and necessary for the realisation of individual autonomy”.<sup>36</sup> It appears, then, that the contemporary jurisprudence developed in relation to the hypothetical duty of easy rescue already incorporates a line of argument that might satisfy the ethics of care.<sup>37</sup> Put another way, even if the United Kingdom does not as yet formally sanction those who fail to engage in positive care-giving towards strangers, to impose such a responsibility is at least a *comprehensible* conclusion within the philosophical parameters of the criminal law.

What, then, can the feminist ethics of care really contribute to this debate, if liberal jurisprudence has already framed the issue as one of balance between

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<sup>32</sup> A. Norrie, *Crime, Reason and History* (Cambridge, CUP, 2001), p.123.

<sup>33</sup> A. McIntyre, ‘Guilty Bystanders? On the Legitimacy of Duty to Rescue Statutes’ (1994) 23(2) *Philosophy and Public Affairs* 157, p. 159.

<sup>34</sup> A. Norrie, *Crime, Reason and History* (Cambridge, CUP, 2001), p.123.

<sup>35</sup> A. Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 84 *Law Quarterly Review* 424. See also J. Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford: OUP, 1987), Ch 4. The idea that individual autonomy relies upon social co-operation derives in turn from the work of Joseph Raz: J. Raz, *The Morality of Freedom* (Oxford: OUP, 1986).

<sup>36</sup> A. Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 84 *Law Quarterly Review* 424.

<sup>37</sup> Suggesting once again at least a superficial coincidence between the feminist ethics of care and communitarian theory, from which the social responsibility view undoubtedly derives: S. Hekman, *Moral Voices, Moral Selves: Carol Gilligan and Feminist Moral Theory* (University Park: Pennsylvania State University Press, 1995).



the opposing values of individual autonomy and social responsibility? Neither the conventional or social responsibility viewpoint contends that care-giving in this context is anything other than commendable; their mutual focus is instead the extent to which it is appropriate to impose a duty of compulsory care-giving. What is more, a significant number of liberal legal commentators continue to advocate such criminal laws. In the following section I shall briefly outline why I think the ethics of care might indeed have something to offer here. Specifically, I contend that relational feminism thinking could support an alternative argument against criminalisation in this context, by challenging the underlying discursive parameters that have set the terms of the liberal debate.

### **FEMINIST ANXIETIES: POWER, STIGMA AND COMPULSORY CARE**

Many feminists remain quite rightly cautious about the potential of law as a tool with which to alleviate the oppression of women.<sup>38</sup> It is in this vein that I too approach the criminal law duty to rescue as a vehicle for the imposition of an ethics of care. Most obviously problematic, whether or not one concludes we owe a moral obligation toward strangers in need, is that criminalisation is unlikely to prove an effective way to inculcate this attitude in human beings. One might note, for instance, the recognition by Blum that altruistic feelings towards others cannot be imposed from above, but must be felt within the very soul of an individual.<sup>39</sup> Such an observation, while undoubtedly correct, fails of course to consider the duty of easy rescue in light of the criminal law's own rationalities and objectives; the criminal law sets out not to govern the soul of the individual but merely to deter and punish wrongful behaviour. Nevertheless, even under these terms, the criminal law duty remains potentially troubling for relational feminism, and for rather different reasons to those provided by the conventional view. In short, the broad liberal jurisprudence within which the conventional and social responsibility views are located suffers from an impoverished conception of the realities of care-giving.

Current jurisprudence presents the debate in terms of the competing interests of the individual and the community; its assumption is that the maximisation of individual autonomy is required to enable citizens to selfishly protect their own self-interest. The refusal to rescue the drowning stranger is categorised accordingly as the rejection of care-giving in favour of the pursuit of one's own goals. On this analysis, the immorality of the passer-by is undisputed by either side of the argument. However, one of the most valuable insights of the feminist ethics of care is the attention it draws to the complex networks of prior ties of kinship formed by individuals that are otherwise masked by liberal law's insistence upon the physical and existential separation of human beings. Might it be possible to conclude, in light of this novel viewpoint, that the refusal to rescue, rather than invariably the reaction of an individual selfishly pursuing his or her own interests, reflects instead their prioritisation (at the expense of the 'drowning stranger') of prior obligations to those dependent upon them for their well-being? In other words, could recognition of prior networks of care-giving within which relational feminists argue we are

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<sup>38</sup> C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

<sup>39</sup> L. A. Blum, *Friendship, Altruism, and Morality* (London: Routledge, 1982).

inevitably located (though these relationships seem to be erased by current jurisprudential debates) alter our appraisal of their decision to walk on by? Take, for example, the claim often made that the imposition of a rescue duty would encourage an individual to risk his or her own safety in order to attempt a rescue the drowning stranger. In circumstances of possible danger is refusal to rescue inevitably an act of selfishness toward our fellow human beings? Or could it also sometimes be an act of *selflessness*, protecting oneself from harm in order to ensure we remain empowered to care for those we love and who depend upon us? Whatever the answer to that question, arguably the framing of the current jurisprudential debate prevents us from finding it.

Such assertions are not in themselves particularly novel in the broader context of contemporary relational feminist scholarship. Commentators within the field have, in recent years, reassessed the implicit claim of earlier writers that justice and care are irreconcilable values. Some now argue instead that care-giving has to take place from a position of justice if it is to avoid disempowering both carer and dependant.<sup>40</sup> Drawing from this insight, I would suggest that the criminal law's protection of the classic justice-based concept of freedom in the case of the duty of easy rescue, while potentially working to the detriment of the drowning stranger, may better serve an ethics of care by providing space beyond the disciplinary sphere for human beings to satisfy the demands placed upon them by prior ties of kinship and dependency. It is for this reason that relational feminist lawyers should perhaps remain wary of the general duty of easy rescue towards strangers, even though at first sight it might appear conducive to the promulgation of a societal ethics of care.

Developing my analysis further, in this section I want to consider how the criminal law currently imposes compulsory care-giving,<sup>41</sup> asking again what relational feminist theorising can contribute to our understanding of the gendered structuring of contemporary law and legal theory. To do so I return to the theoretical claims outlined earlier in this article about the association of the ethics of care with broader truths about women's lived experience. Specifically, I want to draw upon feminist concerns that, whether the association of women with interdependence, care and nurturing is presented as the product of biological essentialism or psychological conditioning, it tends to ensure that women who fail to match up to the standards of care-giving expected from their gender are stigmatised and punished. Further, it is important to consider the feminist observation that while women are disproportionately responsible for care-giving in society, too often patriarchal power ensures that this role has been imposed upon women rather than freely chosen by them. To paraphrase Sandra Bartky, feeding men's egos and tending men's wounds is intrinsically related to women's disempowerment.<sup>42</sup>

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<sup>40</sup> D. Bubeck, *Care, Gender and Justice* (London: Clarendon, 1995), Ch 5.

<sup>41</sup> L. Alexander, 'Criminal Liability for Omissions: An Inventory of Issues' in S. Shute and A. Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford: OUP, 2002).

<sup>42</sup> S. L. Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (London: Routledge, 1991). Of course, some women who might be classified as coerced into care-giving, claim instead that their role as care-givers is actually empowering. However, Bartky contends, in response, that subjective feelings of empowerment are not the same as actually having power. See also S. Mullet, 'Shifting perspectives: A new approach to ethics' in

In short, authentic care cannot occur under conditions characterized by male domination and female subordination in which women are economically, socially or psychologically coerced into care-giving.

These relational feminist insights inform the following analysis of the common law rules imposing omissions liability. Like the debates over the duty to easy rescue these rules are well-known to every law student. And most interesting among them in terms of their gendered implications, (and particularly the material impact for women) are the criminalisation of care-giving in the context of what the law deems 'special relationships', together with liability accrued following 'voluntary undertaking of responsibility' for another's welfare.<sup>43</sup>

I want to use as my primary legal illustration, for the purpose of this section, another memorable staple of a law student's education in criminal law: the tragic case of *Stone and Dobinson* heard by the Court of Appeal in 1976.<sup>44</sup> The death from anorexia of the 61-year-old younger sister of the defendant Stone, surrounded by her own excrement and covered in bed sores, is an obvious point of reference for students of omissions liability. Stone and Dobinson, his female partner who lived with him in his home, were charged and convicted for gross negligence manslaughter.<sup>45</sup> Part of the defendants' appeal rested upon the claimed absence of an omissions duty on the part of the two parties. It was confirmed that Stone's proximate blood relationship to his sister was enough to warrant such a duty. Dobinson, his partner, on the other hand, posed a more difficult challenge for the court: without a blood connection she did not have the necessary special relationship with the victim. Nevertheless, the court observed that during the time the victim had stayed with the couple Dobinson had provided her with food and other necessities. This, the court concluded, was a voluntary undertaking of responsibility for the victim and an omissions duty had therefore existed. Both appeals were refused and the couple were sentenced to significant periods of imprisonment.

One must remain wary, of course, when drawing conclusions from this case. Decided in the 1970s, and simply one brief encounter by the criminal process with (feminine) care-giving, one needs to be careful not to over-generalise its importance to our understanding of the criminal law's approach to care-giving. Yet I cannot help but find it incredible that the gendered implications of the case have not yet been submitted to even the most cursory of feminist re-readings.<sup>46</sup> For that reason, it forms the focal point of the following analysis.

#### **(a) "Special" relationships of care: judging motherhood**

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L. Code, S. Mullet, and C. Overall (eds) *Feminist Perspectives: Philosophical Essays on Method and Morals* (Toronto: University of Toronto Press, 1988).

<sup>43</sup> For a general introduction to the common law rules of omissions liability, see A. Simester and R. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Hart, 2008).

<sup>44</sup> [1977] 2 All ER 341, CA.

<sup>45</sup> The offence of gross negligence manslaughter at the time was based on a form of objective recklessness, predating the rules implemented in the decision of *Adomako* [1995] AC 1, HL.

<sup>46</sup> This is particularly strange given its central position in the canon of academic case law.

Perhaps the most well-established omission duties derive from the special set of obligations imposed by the criminal law upon particular human relationships.<sup>47</sup> These status relationships are clearly signifiers of law's own hierarchy of the responsibilities human beings owe to one another. Intrinsic relationships of care-giving are those founded upon conjugality between spouses,<sup>48</sup> the dependency of a child upon his or her parent<sup>49</sup> and other proximate blood relationships.<sup>50</sup> To a certain extent, this approach to compulsory care-giving must pose difficulties for some feminists. Considered against the backdrop of the refusal to impose duties towards strangers, these rules reinforce a traditional normative model of kinship and interdependency organised around conjugality and blood ties. In turn, they provide another reminder of the historic heteronormative preoccupations of the common law.

On the other hand, one might expect relational feminists to support the significance given here to the care of children. Recognition of the value of the nurturing of the young, and the depth of the interrelationship between mother and child, is central to relational theories. As noted earlier, many such scholars derived their ethical framework from the practical reality of women's care-giving arising from their role as mothers. For instance, Martha Fineman proposes a normative hierarchy of care-giving that places the mother-child dyad at the heart of care.<sup>51</sup> One might conclude, then, that at the very least the criminal law's claim about the intrinsic responsibilities of care-giving incumbent on a parent is indisputable from a feminist relational perspective. Yet what must still remain troubling for feminists in this context is the role of judgement intrinsic to a disciplinary, and materially punitive, system like the criminal law, and how invariably this judgement has gendered implications.

Moral judgment by the legal system upon child-rearing is likely to affect women disproportionately because they remain predominantly responsible for the care of young people. One of the classic liberal arguments against omissions duties is that, unlike offences of action defined clearly in terms of the prohibited behaviour, the criminal law provides no guide to the steps required to satisfy their duties of care-giving.<sup>52</sup> Yet there is unlikely to exist the same jurisprudential concern about lack of clarity in the context of parenting, as caring duties of parenthood tend to be presented as self-evident. More particularly, contemporary discourses tend to glorify motherhood.<sup>53</sup> Society continues to shore up powerful standards upon women and this gives rise to the general concern that an ethics of care, when associated with women specifically, has dangerous implications. Indeed, this fear seems to be borne out by the recent spate of 'failure to protect' statutes. The reality of many

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<sup>47</sup> Note, though, that the duty between parent and child was actually a much more recent development than one might imagine: P. Glazebrook, 'Criminal Omissions: the Duty Requirement in Offences Against the Person' (1960) 55 *Law Quarterly Review* 386.

<sup>48</sup> *Smith* [1979] Crim LR 251.

<sup>49</sup> *Gibbons and Proctor* (1918) 13 Cr App R 134.

<sup>50</sup> *Stone and Dobinson* [1977] 2 All ER 341, CA (brother and sister).

<sup>51</sup> M. Fineman, *The Neutered Mother: The Sexual Family and Other Twentieth Century Tragedies* (London: Routledge, 1989).

<sup>52</sup> W. Wilson, *Central Issues in Criminal Theory* (Oxford: Hart, 2002).

<sup>53</sup> L. Panko, 'Legal Backlash: the Expanding Liability of Women who Fail to Protect their Children from their Male Partner's Abuse' (1995) *Hastings Women's Law Journal* 67.

women's lived experiences, in which harm to children in contexts of domestic violence by violent male partners, seems to carry little weight in the face of an apparent expectation that mothers can and should do everything in their power to protect their children from harm.<sup>54</sup> Moreover, the process of punishment of mothers in contexts of domestic violence also ensures discursive constructions that position mother and child in opposition to one another. In such circumstances, law fails to adequately recognise the extent to which punishment of the mother ultimately harms the child and that they are both the victims of the violence meted out most often by a man.<sup>55</sup>

In light of these observations, the decision in *Stone and Dobinson* is perhaps revealing when considered again from a relational feminist perspective (as long as one remains aware of the provisos raised earlier about the contribution a single case can make to our conclusions about the care-giving experiences of women). Generally (and most obviously) what the decision seems to reinforce is the broader claim that women more often than not find themselves primary care-givers in domestic relationships. Though the victim was Stone's blood relative it was Dobinson who took on all care-giving responsibilities. There is the suggestion of even greater illustrative potential, however, when one considers the short paragraph, entirely ignored by the Court of Appeal itself in reaching its judgment on the case, in which the leading judge describing in passing Dobinson's interrogation by the police:

When asked, "You are a woman and you go into the bedroom. Your own common sense would tell you that she needed attention?" She is said to have replied "She never complained so I didn't bother."<sup>56</sup>

The specific, explicit reference to Dobinson's sex, and the particular common sense of caring apparently available to her as a woman, provides a fleeting glimpse, perhaps, of deeper gendered conclusions about her conduct. In the context of care-giving there is seemingly nothing more damning than a woman's inability (or refusal) to satisfy the social expectations of her gender.

### **(b) Voluntary undertaking of responsibility: of choice and coercion**

One might well conclude that the rule that an omissions duty will arise if a defendant has voluntarily undertaken responsibility for another provides a more attractive model for compulsory care-giving than the imposed status offences. There are two components to the justification for criminal liability in this context. First, in undertaking responsibility for another you are identified as primary carer and, accordingly, others that might seek to take on caring responsibilities would be deterred from interfering in the welfare of the dependent individual. Second, the requirement of voluntariness appears to reflect again the prioritisation placed by the criminal law upon individual autonomy. Beyond the expectation of the law that you care for those within the (constructed) family unit, care is entirely in your gift, to be entered into in a quasi-contractual fashion. Drawing once more from my previous argument,

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<sup>54</sup> J. Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?' [2007] Crim LR 923.

<sup>55</sup> Ibid.

<sup>56</sup> [1977] 2 All ER 341, p. 344.

while responsibilities to others are subject, then, to the prior value of the individual, this could in fact be viewed as necessary, in certain circumstances, to enable the realisation of prior care-giving responsibilities. Rather than treating such an approach as an indication of a selfish legal order it might be seen instead to provide individuals with a space within which they can ensure that they satisfy their responsibilities to those dependent upon them. If one wishes to care for another then one should be able to take on that responsibility voluntarily, bringing oneself within the ambit of the criminal law.

Yet I am also concerned by the broader implications of the notion of a voluntary undertaking of responsibility. Underpinning the interpretation of the duty as I have presented it here is a construction of care-giving that appears once again to be based upon a masculine model of care. Voluntary undertaking of responsibility for others as an ethical basis for criminal liability, because one has actively claimed a duty for another's care, assumes that individuals are empowered to negotiate these responsibilities freely. However, as noted above, the experience of womanhood promulgated by relational feminists asserts that connection is too often the result of economic, social or psychological coercion. Put another way, the notion of voluntary undertaking of responsibility fails to consider the possibility that care-giving might not always be freely negotiated (with all the implications carefully evaluated) from a position of separation and therefore power, but may be imposed when contexts and circumstances position individuals within relationships of care-giving and dependency. One particular problem with such coercion is that individuals often find themselves subject to care-giving responsibilities that they are unable to effectively satisfy. More importantly, however, it is men who are usually most free to negotiate in and out of these relationships of care.

My concern extends beyond the parenting role to all relationships in which one finds systemic coercion over the care-giving roles of individuals. For instance, a well-established basis for omissions liability, deriving from the broader liability arising from voluntary undertaking of responsibility, is the contract. Alan Norrie has suggested that the development of this contractual model reflected the need to find a basis for the increasing interconnectedness of capitalism in late nineteenth century England.<sup>57</sup> But with capitalism comes also the role economic power plays in shaping the process of undertaking, again challenging the model of free negotiation of care-giving responsibilities (available to the white, middle class male) that the criminal law presumes.

I want to return, finally, to the case of *Stone* and a further excerpt from the overlooked police interview with Mrs Dobinson. Once again, I am wary of drawing specific conclusions about the nature of law from this case. It involves one story, one particular era, and one particular woman. Yet what seems to peculiar to me is the absence of any consideration of the explicitly gendered implications of the context in which Dobinson's care-giving seems to have taken place. As the Court of Appeal noted:

The appellant [Dobinson] said she kept telling Ted (the other appellant), but that he would not do anything. He just told her, "Leave it while tomorrow." She was asked why

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<sup>57</sup> A. Norrie, *Crime Reason and History* (Cambridge: CUP, 2001), p. 126.

she did not get help and she replied, "I asked him to get a doctor. He said he had tried to, but because the deceased was not on his panel the doctor wouldn't come." When asked why she did not speak to the lady next door or to Mrs. Wilson's daughter, who was a nurse, she is said to have replied, "I daren't. He is boss down there. I daren't do anything unless he tells me. She is not my sister, so I left it to him."<sup>58</sup>

This excerpt serves as an illustration of the reality that care-giving by women often takes place in the absence of the kind of empowerment predominantly experienced by men, and assumed by the notion of voluntary undertaking.

Finally, the decision in *Stone and Dobinson* is useful for relational feminists beyond the insight it provides into women's experience of compulsory care-giving because it suggests the rule on voluntary undertaking of responsibility potentially remains structurally gendered. As Alan Norrie has previously noted, closer consideration of the case suggests some problematic reasoning:

The argument rests on a play on the concept of an undertaking. Dobinson had, as a matter of fact, 'undertaken' certain actions on the deceased's behalf, but there was no evidence that she had made an undertaking to perform such tasks as she performed. There is a slide in the judgment between 'undertaking' in a practical and in a 'contractual' sense.<sup>59</sup>

Norrie argues that the concept of undertaking was deliberately "manipulated into action" in this way by the judges of the Court, who appreciated "they had no real basis in law for establishing a duty to act in the case of [the] defendant",<sup>60</sup> in order to ensure a conviction in the face of the harrowing death of the victim. However, from a relational feminist perspective I want to pose a further alternative interpretation of this apparent slippage in meaning. Could it be said instead that the judges of the Court, acculturated themselves according to a masculine vision of empowered negotiation of care-giving responsibilities, actually believed that evidence of Dobinson's practical care-giving presupposed that her responsibility was voluntarily undertaken? If so, it is perhaps time the reality of coercive care-giving (not just among women) was confronted explicitly within the rules on criminal liability for omissions.

## **CONCLUSIONS**

Relational feminist jurisprudence is increasingly shunned in a postmodern era characterised by a refusal to accept universal subjectivities for women (or any other identity category for that matter). However, if one is sensitive to these criticisms, it still continues to provide in my view valuable new perspectives on patriarchal jurisprudence, as the basis for a persuasive feminist ethical framework. In the context of legal studies in particular, the ethics of care provides a significant jurisprudential counterpoint to the prioritisation of individual autonomy within the contemporary legal order, in its recognition that none of us can claim to be wholly separate from other human beings, positioned as we are within complex prior networks of care-giving and dependency. This simple observation has important implications for our

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<sup>58</sup> [1977] 2 All ER 341, p. 344.

<sup>59</sup> A. Norrie, *Crime Reason and History* (Cambridge: CUP, 2001), p. 127.

<sup>60</sup> *Ibid*, p. 127.

understanding of law's patriarchal ancestry and possible visions for its future, as I hope this reconsideration of the rules of omissions liability has shown.

The central thesis of this article, drawing upon the insights of relational feminism, was a tentative critique of both the jurisprudence and legal rules that govern our thinking about criminal omissions liability. As a further final observation, however, I should also add that references throughout to the formative role of the concept of criminal omissions in an undergraduate student's legal education were also deliberate. The 'drowning stranger', the special status relationships, the notion of a voluntary undertaking of responsibility and the case of *Stone and Dobinson* are more than simply the stuff of academic research. They also contribute significantly to lawyers' own ethical development and comprehension of the transformative role of law. Accordingly, the constructions of care-giving that I have suggested could arise from the law in this area, from the masculine anxieties of annihilation by the other, and the pervasive assumptions about the realities of care-giving from a clearly male viewpoint, have the power to shore up patriarchal jurisprudence. Omissions liability as an educational tool would benefit immensely, I would therefore contend, from reconsideration through the lens of the ethics of care.

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